

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>RICHARD J. AND LINDA B. FASINO</b>	:	ORDER
	:	DTA NOS.
	:	816423 AND 816424
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax	:	
Law for the Period January 2, 1994 Through January 18,	:	
1996	:	

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Petitioners, Richard J. and Linda B. Fasino, 490 Van Voorhis Avenue, Rochester, New York 14617, filed petitions for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the period January 2, 1994 through January 18, 1996. A hearing on the petition was scheduled before Administrative Law Judge Jean Corigliano at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York on Tuesday, December 7, 1999 at 10:30 A.M. Petitioners did not appear at the hearing. On January 27, 2000, a default determination denying the petition was issued by Administrative Law Judge Corigliano.

On March 16, 2000, petitioners, appearing *pro se*, filed a request that the January 27, 2000 default determination be vacated. On June 25, 2001 and September 5, 2001, petitioners submitted additional information regarding their request to vacate the default. The Division of Taxation appearing by Barbara G. Billet, Esq. (Justine Clarke Caplan, Esq., of counsel) filed a response in opposition to petitioners' request on September 28, 2001. Based upon the record in

this matter as well as the submissions of the parties, Chief Administrative Law Judge Andrew F. Marchese renders the following order.

***FINDINGS OF FACT***

1. On March 26, 1998, petitioners filed separate petitions challenging a series of assessments of withholding tax under Article 22 of the Tax Law for tax periods January 2, 1994 through January 18, 1996. Petitioners were assessed as responsible officers of Fasino's Power Brake, Inc.

2. A hearing in this matter was scheduled for January 6, 1999 in Troy, New York. Pursuant to petitioners' request, this hearing was adjourned. A hearing was next scheduled for March 22, 1999 and once again adjourned at petitioners' request. The hearing was then scheduled for December 7, 1999. This date was agreed to by petitioners. However, petitioners then once again requested an adjournment of the hearing. In this instance, the request for adjournment was denied.

3. On December 7, 1999 Administrative Law Judge Jean Corigliano called the ***Matter of Richard J. and Linda B. Fasino*** for hearing. Neither petitioner appeared for the hearing. The representative for the Division of Taxation moved for a default determination. On January 27, 2000, Administrative Law Judge Corigliano issued a default determination denying the petitions.

4. On March 16, 2000, the Division of Tax Appeals received an undated request from petitioners to vacate the default. Assistant Chief Administrative Law Judge Daniel Ranalli responded to petitioners on March 20, 2000 explaining to them what was required to vacate the default. On June 25, 2001, some 15 months later, petitioners finally responded to Judge Ranalli's letter. Further correspondence ensued, and in their letter dated September 5, 2001, petitioners advised the Division of Tax Appeals for the first time that Richard Fasino had filed a

petition under Chapter 13 of the Bankruptcy Code in January of 1996. This action was concluded in November 2000. Linda Fasino filed for bankruptcy under Chapter 7 of the Bankruptcy Code in July of 1999 and withdrew her petition in April 2000.

13. In its response dated September 28, 2001, the Division of Taxation argued that petitioners have shown neither an excuse for their default nor a meritorious case.

### ***CONCLUSIONS OF LAW***

A. Section 3000.15(b)(2) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.15[b][2]) provides: “[i]n the event a party or the party’s representative does not appear at a scheduled hearing and an adjournment has not been granted, the administrative law judge shall, on his or her own motion or on the motion of the other party, render a default determination against the party failing to appear.”

Section 3000.15(b)(3) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.15[b][3]) provides: “[u]pon written application to the supervising administrative law judge, a default determination may be vacated where the party shows an excuse for the default and a meritorious case.”

B. Section 362(a) of the Bankruptcy Code (11 USC 362) provides that in the case of voluntary, joint and involuntary bankruptcy proceedings, the filing of a bankruptcy petition creates an automatic stay upon, among other things,

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title . . . .

Subsection (b) of section 362 provides various exceptions to the rule found in subsection (a). However, none of the exceptions would apply to the instant tax appeals proceeding.

C. The automatic stay created by section 362 becomes effective immediately upon the filing of the petition in bankruptcy (*In re Florida Dairy, Inc.* 22 Bankr 197). Any action taken in violation of the automatic stay is a nullity (*In re Shamblin*, 890 F.2d 123; *In re Fasgo, Inc.*, (58 Bankr 99). This is true even though the action was taken without knowledge of the filing of the petition (*In re Scott*, 24 Bankr 738). Accordingly, the default determination issued in this matter is a nullity and must be vacated.

D. It is ordered that the request of Richard J. and Linda B. Fasino to vacate the default determination be, and it is hereby, granted and the default determination issued January 27, 2000 is vacated. It is further ordered that this matter be restored to the hearing calendar of the Division of Tax Appeals and this matter shall be heard on January 29, 2002 at 10:30 A.M. in the offices of the Division of Tax Appeals in Troy, New York.

DATED: Troy, New York  
January 3, 2002

/s/ Andrew F. Marchese  
CHIEF ADMINISTRATIVE LAW JUDGE